

Criminal Justice 1968: Developments and Directions

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I. Introduction

During the last few years our system for the administration of justice has evolved at a revolutionary pace. The crime rate has risen,¹ but the basic questions remain the same. What conduct should be made punishable? What should be done with those found guilty of prohibited conduct? What kinds of procedures should society permit to be utilized in the investigation, apprehension, and disposition of persons accused of crime?²

Today, however, the answers to some of these questions are less clear, or quite different from those answers which would have been generally acceptable less than a generation ago. Some of the premises which underlie our system for the administration of criminal justice are being reexamined in the light of empirical data previously unknown or ignored. Experimentation is taking place in areas where change has been traditionally regarded as anathema. The virtues of some of the ancient institutions of the criminal process are being reevaluated. Some procedures which have been tolerated for centuries have been discarded. States have been required to modify customary practices to insure the observance of federal constitutional rights. Research on a national scale is destroying myths concerning offenders, victims, and the nature of criminal conduct. There is a growing awareness that the characterization of some types of cases as

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1. See UNIFORM CRIME REPORTS—1966, CRIME IN THE UNITED STATES (1967). THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 14-41 (1967); 2 CRIM. L. RPTR. 2228 (1967).

2. J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 6, 18 (1940).

"criminal" or "civil" is less significant than the issue of what type of sanction is being exerted against the citizen by the state, and the rights which a citizen should be permitted to exert under such circumstances. Our system for the administration of justice is truly in a state of transition.

II. Reform in the Substantive Law

A lawyer of a generation ago would feel much more at home today if called upon to deal with the substantive criminal law than if he were required to deal with the field of criminal procedure. In the substantive field, the reformers are still largely voices crying in the wilderness. A few modern codes have attempted to remove some of the technicalities which confused the law, such as the distinctions between larceny, embezzlement, and false pretenses,³ but there has been little disposition to accept proposed reforms in more controversial areas.

Consensual Sexual Offenses

Many scholars question the wisdom of attempting to punish consensual sexual conduct committed by adults in private—adultery, fornication, homosexuality, sodomy.⁴ They argue that these laws are historical relics of an era in which the law attempted to punish conduct deemed to be sinful or immoral and have no place in a modern pluralistic society.⁵ In addition, they assert that these laws are rarely enforced, and attempts at enforcement tend to promote conduct by the police which is unacceptable to society, such as invasions of privacy by secretive surveillance and psychological entrapment by vice officers.⁶ The prestigious American Law Institute (A.L.I.) determined not to punish consensual sexual conduct by adults in its Model Penal Code,⁷ and recently, both the Houses of Commons of the United Kingdom and of Canada have reached similar conclusions.⁸ However, the

3. See ILL. ANN. STAT. ch. 38, § 16-1 (Smith-Hurd Supp. 1967); WIS. STAT. ANN. § 943.20 (Supp. 1967).

4. REPORT OF THE COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION [WOLFENDEN REPORT] 9-10, 20-21, 24, 79-80 (British ed. 1957); *Symposium on Sex Offenses*, 25 LAW & CONTEMP. PROB. 215-375 (1960); Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A.L. REV. 643 (1966); Comment, *Private Consensual Adult Behavior, the Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581 (1967); Ploscowe, *Report to the Hague: Suggested Revisions of Penal Law Relating to Sex Crimes and Crimes Against the Family*, 50 CORNELL L.Q. 425 (1965); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963); cf. Cutler, *Sexual Offenses—Legal and Moral Considerations*, 9 CATHOLIC LAW. 94 (1963).

5. *Ibid.*

6. J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 100-03 (1966).

7. MODEL PENAL CODE § 207, Comment (Tent. Draft No. 4, 1955).

8. N.Y. Times, July 5, 1967, at 1, col. 7; N.Y. Times, Dec. 22, 1967, at 3, col. 1.

arguments of the opponents of our sex laws have generally fallen on deaf ears in the state legislatures of the country.

Abortion

Attempts to liberalize the abortion laws have usually shared a similar fate, but a consensus seems more likely to develop in this area. In September 1967, an International Conference on Abortion sponsored by the Harvard Divinity School brought together clerics, doctors, lawyers, and other interested citizens to discuss the wisdom of changes.⁹ It seems likely that some states will liberalize their laws to permit abortions where the health of the mother requires, where there are strong medical reasons to believe that the baby may be defective, and where pregnancy results from rape or incest. North Carolina,¹⁰ Colorado,¹¹ and California¹² have amended their abortion laws during the last year.

Business Crimes

A gradual appreciation that too much is being expected of the criminal law in the regulation of business activities is also developing.¹³ Many of our laws proceed upon the assumption that the best or only way to discourage undesired business conduct is to make that conduct criminal. Consequently, our codes contain many business offenses, frequently misdemeanors, which sometimes are dead letters on the statute books, and more frequently, are punished by fines, which are viewed by the corporate defendant as one of the costs of doing business which ultimately will be transmitted to the consumer.¹⁴ There are usually other and better ways than the criminal law to persuade businesses to abstain from undesired conduct and there are more effective institutions to regulate businesses than the criminal courts. Use of powers such as cease and desist orders, injunctive relief, licensing, and taxation is available and probably will be used to a greater extent in the years to come. The sophisticated society of the sixties requires judicious

9. See 1 CRIM. L. RPT. 2351 (1967).

10. N.C. GEN. STAT. § 14-45.1 (Supp. 1967).

11. Colo. Sess. Laws 1967, ch. 190, § 5.

12. Cal. Laws 1967, ch. 327.

13. See Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963). Cf. Harrison, *Penal Actions for Trademark Infringement: A Survey of Statutes and Cases*, 57 TRADEMARK REP. 285 (1967); Egan, *Criminal Economic Law and Consumer Protection*, 1967 J. BUS. L. 26.

14. See, e.g., 36 Stat. 351 (1910), 45 U.S.C. § 39 (1964) which makes it a misdemeanor for a railroad to fail to comply with its statutory obligation to issue a monthly report to the Interstate Commerce Commission of all collisions, derailments or other accidents, and provides a penalty of not more than \$100 for each offense, and for each day that the report is late.

use of the many different types of societal sanctions which are available to encourage conduct deemed to be desirable and to deter conduct thought to be contrary to the public good.¹⁵ The criminal law approach of combining prohibition with punishment has the virtue of simplicity, but lacks the flexibility necessary to deal with the broad field of business activity in which regulation is required.

Criminal Responsibility

Perhaps the greatest controversy in recent years revolves around the issue of criminal responsibility. This broad subject includes within its ambit such diverse issues as the effect of a defendant's mental condition on sanctions imposed, the responsibility of juveniles, and the status of chronic alcoholics and dope addicts.

The law's attempt to wrestle with these problems frequently involves a type of circular reasoning. On the one hand, a decision that a person should not be held responsible necessitates the conclusion that he has not committed a crime, and hence should not be punished, although his condition may be such that he should be treated. On the other hand, if it is premised that a class of persons should be treated rather than punished, there is a tendency to conclude that members of the class should not be held responsible for their acts. At the same time, most students of modern penology accept the thesis that one of its purposes is the rehabilitation of offenders who have been determined responsible. Thus, a theoretical conflict sometimes arises over whether a defendant should be held responsible and rehabilitated, or held not responsible and treated. In some cases the actual disposition of the offender may be the same. If convicted he may receive psychiatric treatment within the prison system; if found not responsible, he may receive similar treatment in a mental hospital.¹⁶ The stigma attached to his status, however, may differ.

Unfortunately, prison systems frequently have no facilities for dealing with the defendant's mental problems. A determination of responsibility followed by incarceration temporarily prevents a defendant from committing an offense, but when released, his underlying mental condition will soon manifest itself in repeated criminal conduct. The classic examples are the chronic alcoholics who throughout their lives receive sentences of \$30 or 30 days, interspersed between drinking bouts. The issue of mental responsibility reaches its greatest significance in capital cases where the decision as to responsibility may determine whether a defendant is hospitalized or hanged.

15. See R. ARENS & H. LASSWELL, *IN DEFENSE OF PUBLIC ORDER* (1961).

16. See *Green v. United States*, 351 F.2d 198 (D.C. Cir. 1965).

This is not the place to discuss the defense of insanity in detail. All jurisdictions recognize that it is unfair to apply the sanctions of the criminal law to a person who is not responsible for his acts because of a mental illness, disease, or defect. It is common knowledge that during the last fifteen years the courts and legislatures of many states have reexamined the *M'Naghten Rule*¹⁷ and the "irresistible impulse test,"¹⁸ the traditional standards of criminal responsibility, in the light of the controversy engendered by the *Durham Rule*¹⁹ and the proposals of the American Law Institute.²⁰ The literature on the subject is extensive and a definitive work in the field has just been published.²¹ It is sufficient for present purposes to note that a trend towards reform is clearly indicated. Three state courts and four federal courts of appeal have adopted the A.L.I. standard without legislation.²² Six other state legislatures have enacted statutes which follow the A.L.I. model with minor variations in language.²³

An appreciation that there are people incapable of controlling their conduct because of their mental condition is also evidenced in recent court decisions dealing with drug addiction and chronic alcoholism. In 1962, in *Robinson v. California*,²⁴ the Supreme Court of the United States reviewed

17. *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).

18. *Cf. State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

19. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). In *Durham*, Chief Judge Bazelon argued that there were some individuals who were not responsible for their acts even though they could perceive the difference between right and wrong. The court held that a person should not be subjected to the penalties of the criminal law if his act "was the product of a mental disease or defect." The test was two-fold: (1) Did the defendant have a mental disease or defect at the time he committed the act? (2) Was his act the product of his mental disease or defect? "Mental disease or defect" was subsequently defined as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962). The principal impact of the *Durham* rule has been the impetus it has given to reexamination of the wisdom of *M'Naghten* which are still being conducted. In addition, it has sparked fundamental reappraisals of the nature and purposes of the criminal process. See Bazelon, *The Concept of Responsibility*, 53 GEO. L.J. 5 (1964).

20. The MODEL PENAL CODE provides in § 4.01:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. *Cf. United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

21. A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); see also R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967).

22. 1 CRIM. L. RPTR. 1021 (1967).

23. *Ibid.*

24. 370 U.S. 660 (1962). For commentary on this case, see 51 CALIF. L. REV. 219 (1963); Note, 111 U. PA. L. REV. 122 (1962); McCloskey, *The Supreme Court 1961 Term*, 76 HARV. L. REV. 54, 143 (1962). See also Broeder & Merson, *Robinson v. California: An Abbreviated Study*, 3 AM. CRIM. L.Q. 203 (1965).

a California statute which punished narcotic addiction. The Court concluded that addiction to narcotics was a disease and held that punishment of the defendant for addiction constituted the imposition of a cruel and unusual punishment prohibited by the eighth and fourteenth amendments.²⁵ The Court distinguished the California statute which punished the accused for his "status as an addict" from other enactments which punish a person for the use, purchase, sale or possession of narcotics, or for antisocial or disorderly behavior resulting from their administration.²⁶ Prosecutions for these offenses, which involve "irregular behavior" or "antisocial conduct" have continued, despite claims of cruel and unusual punishment and assertions that addiction constitutes a mental disease which entitles a defendant to a judgment of not guilty by reason of insanity.²⁷

In the *Robinson* case, the Court intimated that the states could compel addicts to accept treatment for their affliction even if it could not label addiction a crime. This dictum has given considerable impetus to enactment of drug addiction commitment statutes. Many states have for some time authorized the commitment of addicts in the same manner as the mentally ill, but few addicts have in fact been committed.²⁸ In 1961, California passed a special statute dealing with the commitment of addicts²⁹ and since the *Robinson* opinion, New York,³⁰ Massachusetts,³¹ and the federal government have enacted similar measures.³²

As Professor Dennis S. Aronowitz has recently pointed out,³³ these new statutes are essentially similar in philosophy and approaches. All permit the involuntary commitment of persons addicted to drugs who are neither charged with nor convicted of crime. Under all programs except that of California, some addicts charged with crime may volunteer for commitment in lieu of standing trial on criminal charges. Furthermore, addicts convicted of crime, with some exceptions, may be committed by the courts for treatment *instead* of being sentenced to terms of imprisonment. Addicts committed under these acts will receive treatment initially in specialized centers and later as outpatients. Proponents of these statutes believe that

25. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

26. *Id.* at 664-67.

27. See Bowman, *Narcotic Addiction and Criminal Responsibility Under Durham*, 53 GEO. L.J. 1017 (1965).

28. Aronowitz, *Civil Commitment of Narcotic Addicts*, 67 COLUM. L. REV. 405 (1967).

29. CAL. WELF. & INST'NS CODE §§ 3100-11 (West 1966).

30. N.Y. MENTAL HYGIENE LAW § 206 (McKinney Supp. 1967).

31. MASS. GEN. LAWS ANN. ch. 111A, §§ 3-7 (Supp. 1966).

32. Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438; 42 U.S.C. § 3411 (Supp. 1967), 18 U.S.C. §§ 4251-55, 28 U.S.C. §§ 2901-06 (Supp. II, 1965-66).

33. Aronowitz, *supra* note 28. The paragraph which follows is paraphrased from Professor Aronowitz's excellent article. See also *In re De La O*, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963).

addicts can be cured of their psychological dependence upon drugs by such treatment programs.

In 1966, the rationale of the *Robinson* decision was extended by the United States Court of Appeals for the Fourth Circuit, which, on the ground of cruel and unusual punishment, overturned a North Carolina conviction of a chronic alcoholic for the offense of public intoxication.³⁴ Public intoxication was viewed as the "involuntary symptom" of the "status" of chronic alcoholism.³⁵ Unlike the California statute involved in *Robinson*, the North Carolina statute did not punish a status per se. North Carolina made no attempt to punish the defendant for being a chronic alcoholic. He was punished for appearance in public while intoxicated. Nevertheless, the court considered the defendant's public drunkenness and chronic alcoholism so intimately connected as to be inseparable. The fourth circuit case has been followed by the Court of Appeals for the District of Columbia Circuit.³⁶ The issue of whether the conviction of a chronic alcoholic for public drunkenness violates the eighth amendment is now before the Supreme Court.³⁷

The fourth circuit and the District of Columbia cases were careful to point out that states could provide for the detention, treatment, and rehabilitation of alcoholics. The cases simply preclude criminal conviction for conduct symptomatic of the condition of alcoholism. Most states have a long way to go before there will be adequate facilities for the treatment of alcoholics whose imprisonment may be prohibited by the Constitution.

The subject of the apprehension, trial, and disposition of juveniles after the *Gault*³⁸ and *Kent*³⁹ decisions is beyond the purview of this paper.⁴⁰ It is sufficient to note that the disposition of juveniles, the insanity defense, the cases involving drug addiction and chronic alcoholism, civil commitments of the mentally ill, and the sexual psychopath laws of some of our states all have elements in common. They constitute a divestment of the criminal law of cases formerly falling within its cognizance. Indeed, some

34. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

35. The *Driver* case has been subjected to critical analysis in Note, 54 GEO. L.J. 1422 (1966). See also Note, 1966 DUKE L.J. 545; Note, 15 CATHOLIC U.L. REV. 259 (1966); Note, 44 N.C.L. REV. 818 (1966).

36. *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966); See Note, *The Criminal Responsibility of Chronic Alcoholics*, 52 CORNELL L.Q. 470 (1967). See also STARR, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S.C.L. REV. 349 (1967).

37. *Powell v. Texas*, *prob. juris. noted*, 389 U.S. 810 (1967) (No. 405).

38. *In re Gault*, 387 U.S. 1 (1967).

39. *Kent v. United States*, 383 U.S. 541 (1966).

40. See Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700 (1967).

astute commentators, such as Professor Nicholas Kittrie,⁴¹ have regarded the trend as a movement towards the therapeutic state in which treatment replaces punishment as the central instrument of social control. Such conclusions may be premature, but it does seem clear that the criminal law of tomorrow will refrain from imposing sanctions upon several classes of people who engage in antisocial activities and who traditionally were subject to its rigors. Society will be required to develop other institutions such as rehabilitation centers for alcoholics and addicts to deal with the problems caused by such persons. The failure to develop such institutions will create a substantial danger to the public if the antisocial actor cannot be imprisoned.

Creation of such new institutions will also require careful consideration of the kinds of procedures which should be used in determining which persons should be committed, the length of their commitment, and the extent of treatment within the institution, if the rights of the mentally ill, the juvenile, the addict, and the alcoholic are to be protected.⁴² Edward de Grazia's admonition that "medicine can be a sort of punishment, *sans* due process of law,"⁴³ must, after all, be remembered. The treatment centers of the therapeutic *parens patriae* must protect individual rights as in a punishment-oriented criminal system. Already one court has decided that it will examine whether an involuntarily committed patient is actually being treated, when a deprivation of liberty is sought to be justified on therapeutic grounds.⁴⁴

III. Dispositional Alternatives

The question of what disposition should be made of offenders continues to be a major problem in administering criminal justice. Today it is generally accepted that the punishment imposed should be tailored to fit the offender as well as the crime. Attempts to apply the maxim, however, frequently clash with the circumstance that the criminal law has several purposes and that any given sentence may not be able to effectuate all of them equally. Modern criminal law has among its objectives retribution, deterrence, incapacitation, rehabilitation, and community education.⁴⁵

41. Kittrie, *The Divestment of Criminal Law and the Coming of the Therapeutic State*, 1 *SUFFOLK U.L. REV.* 43 (1967).

42. See Penegar, *The Emerging "Right to Treatment"—Elaborating the Processes of Decision in Sanctioning Systems of the Criminal Law*, 44 *DENVER L.J.* 163 (1967). Cf. F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964).

43. De Grazia, *The Distinction of Being Mad*, 22 *U. CHI. L. REV.* 339, 355 (1955).

44. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967). See Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 76 *YALE L.J.* 87 (1967).

45. J. SALMOND, *JURISPRUDENCE* 115-24 (11th ed. G. Williams 1957); L. HALL & S. GLUECK, *CRIMINAL LAW AND ITS ENFORCEMENT* 14-17 (2d ed. 1958).

Some modern scholars claim that rehabilitation of offenders is the principal purpose of the criminal law and that the system has no place for the concept of retribution,⁴⁶ but few would deny that deterrence is still a principal aim of punishment.⁴⁷ Some behaviorists would question its efficacy, but as Professor Norval Morris has recently reminded,⁴⁸ we really know very little about it.

A major problem is that the purposes of punishment must be closely related to the causes of crime, and little is known about crime causation. Criminologists and psychiatrists offer competing theories.⁴⁹ Too often lawmakers pay attention to neither. It was a great disappointment to many observers that the National Crime Commission did not attempt to study the subject in depth.⁵⁰

In addition, inadequate facilities or resources frequently preclude any realistic efforts at rehabilitation. A rehabilitation-oriented judge may think twice before ordering probation for a youthful offender when he knows that the probation officer is poorly trained, his caseload already excessive, and his department without funds for psychological or psychiatric assistance.⁵¹ Furthermore, Dean Francis A. Allen has effectively demonstrated that the rehabilitation ideal has inherent limitations.⁵²

Often a judge himself will have to determine what particular purpose of the criminal law should be given precedence when he attempts to individualize the offender's punishment. A doctor found guilty of tax evasion is unlikely to repeat his crime, but a suspended sentence may not provide the desired discouragement for other potential tax evaders. Hanging a murderer will not rehabilitate him, but it certainly prevents recidivism. A lengthy sentence to a youthful car thief is unlikely to reform him, but an indefinite sentence to a special rehabilitation center may achieve good results and have a deterrent effect equal to that of the sentence of imprisonment.

46. See Gardiner, *The Purposes of Criminal Punishment*, 21 MOD. L. REV. 117 (1958); Bazelon, *The Concept of Responsibility*, 53 GEO. L.J. 5 (1964).

47. Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Tappan, *Who is the Criminal?* 12 AM. SOC. REV. 96 (1947).

48. MORRIS, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627 (1966).

49. Cf. E. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 51-62 (6th ed. 1960); H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 206-09 (3d ed. 1959).

50. Cf. A REPORT BY THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 17-18 (1967).

51. See Bazelon, *supra* note 46, at 9-10.

52. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226, 226-29 (1959). See also F. ALLEN, *supra* note 42.

Sentencing

The multipurpose nature of our system⁵³ may preclude consistency in punishments, but it does not follow that reform in the sentencing process is impossible. In the first place, sentencing alternatives available to judges can be broadened, and their access to information relevant to sentencing can be improved. Judges can be educated concerning standards which should be applied. The scope of appellate review can be broadened in order to meet the problem of individual abuse of discretion.

These ideas are not new. Both the American Law Institute Model Penal Code and the Model Sentencing Act drafted by the National Council on Crime and Delinquency reflect an appreciation of the importance of these goals. Today, however, there are new signs of progress. The Advisory Committee on Sentencing and Review of the American Bar Association Project on Minimum Standards for Criminal Justice has recommended standards which, if accepted, would constitute substantial reforms in the sentencing structure and policies of many state courts. The Committee recommends that the judge, not the jury, should impose sentence.⁵⁴ The legislature should not set a specific sentence to be imposed on an offender without regard to the particular circumstances of the case; rather, it should provide a wide range of alternatives to the courts for different categories of offenses.⁵⁵ A judge, in a usual case, might choose a sentence which does not involve confinement, such as probation,⁵⁶ a sentence involving partial confinement,⁵⁷ or total confinement at a usual incarceration facility⁵⁸ or at a special treatment facility (including youth correction facilities).⁵⁹ Fines would be imposed in felony cases only where the defendant had obtained money or property as a result of his crime.⁶⁰

Sentences to imprisonment would be indeterminate in the sense that the court would set a maximum term within the limit set by the legislature and a minimum term at which the defendant would be eligible for parole.⁶¹ The sentences for most offenses would not exceed the five year range.⁶²

53. Cf. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 401-02 (1958).

54. ADVISORY COMM. ON SENTENCING AND REVIEW, A.B.A. PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 1.1 (Tent. Draft, 1967) [hereinafter cited as A.B.A. SENTENCING COMM.].

55. *Id.* § 2.2.

56. *Id.* § 2.3; cf. FED. R. CRIM. P. 32 (a); 18 U.S.C. § 3651 (1964). See A. PYE, G. SHADOAN & J. SNEE, A PRELIMINARY SURVEY OF THE FEDERAL PROBATION SYSTEM (1962).

57. A.B.A. SENTENCING COMM., *supra* note 54, at § 2.4; cf. 18 U.S.C. § 4208 (a) (1964).

58. *Id.* § 2.5.

59. *Id.* § 2.6; cf. 18 U.S.C. §§ 5005 to 5026 (1964).

60. *Id.* § 2.7.

61. *Id.* §§ 3.1, 3.2[b]-[c]; cf. 18 U.S.C. §§ 4208, 4202 (1964).

62. *Id.* § 2.1.

The Committee recommends that a ceiling be placed on consecutive sentences,⁶³ that methods should be developed to integrate sentences imposed by different jurisdictions on the same defendant,⁶⁴ and that multiple offenses be consolidated for sentencing at one time.⁶⁵

A presentence report is recommended in every felony case and in all cases involving first or youthful offenders.⁶⁶ In addition, the court should have access to additional resources where detailed information about the defendant's mental or physical condition is necessary for the determination of a proper sentence.⁶⁷

One of the most recent changes which has occurred in the administration of criminal justice is a new understanding of the role of defense counsel at sentencing. Most persons who are charged with crime are convicted, and many of the convictions result from pleas of guilty. Sentencing is therefore the crucial phase of the criminal process for most defendants. Too often in the past a lawyer has viewed his function at sentencing as limited to a plea for leniency. Today more counsel are appreciating that the plea of leniency is only as good as the factual basis upon which it rests. In appropriate cases, the defense counsel must conduct an independent investigation utilizing available community resources and produce a specific probation program as a reasonable alternative to imprisonment if he is to be effective. Few lawyers have training or experience in the performance of such tasks, but competent representation at sentencing requires the acquisition of new areas of expertise, and lawyers are proving equal to the challenge.⁶⁸

Judges need appropriate standards as well as factual information in order to sentence intelligently. Few lawyers have the knowledge or experience necessary when they are appointed to trial benches for the difficult task of sentencing. During recent years we have accepted the idea that there is nothing degrading about judges studying in order to perform their jobs more effectively.⁶⁹ The National College of State Trial Judges is now able

63. *Id.* § 3.4.

64. *Id.* § 3.5.

65. *Id.* § 5.2.

66. *Id.* § 4.1; cf. FED. R. CRIM. P. 32(c). Presentence reports are prepared in over 80 percent of federal cases; ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REV. 135 (1965). The A.B.A. SENTENCING COMM., *supra* note 54, at §§ 4.3, 4.4, also recommends that the presentence report be made available to the defendant or his attorney, an important step forward. See also Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 835-41 (1968).

67. *Id.* § 4.6; 18 U.S.C. § 4208(b) (1964).

68. Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 295-96 (1966); A.B.A. SENTENCING COMM., *supra* note 54, at § 5.3.

69. See Smith, *Upgrading and In-Service Training for the Judiciary*, 34 INS. COUNSEL J. 598 (1967); O'Connell, *Continuing Legal Education for the Judiciary*, 16 J. LEGAL ED. 405 (1964); Karlen, *Judicial Education*, 52 A.B.A.J. 1049 (1966); cf. Leflar, *The Appellate Judges Seminars*, 21 ARK. L. REV. 190 (1967).

to offer summer courses in which judges can compare experiences and discuss the relative weight which should be accorded different factors in sentencing, as well as engaging in other studies.⁷⁰ In the federal system, there have been a number of seminars and institutes in which judges have discussed sentence disparity and the appropriate use of various sentencing alternatives.⁷¹

These discussions and other studies have raised substantial questions concerning the undue weight given by some judges to the defendant's willingness to plead guilty. In many jurisdictions defendants who insist on exercising their constitutional rights to trial by jury are granted probation less frequently and receive longer terms of imprisonment than defendants who plead guilty.⁷² In some cases the leniency towards guilty pleaders (or the severity towards those who demand trial by jury) seems to be motivated by a belief on the part of the sentencing judge that showing repentance, avoiding perjury, refusing to assert frivolous defenses, and generally co-operating with the system is deserving of special consideration.⁷³ Some judges go so far as to express the opinion that probation should not be granted to a defendant who has pleaded not guilty and demanded a jury trial.⁷⁴ These practices have been criticized as discriminatory whenever an innocent defendant is induced to plead guilty, or a guilty defendant is punished more severely than another defendant with the identical background who has committed the same crime, although each may have an equal need for the rehabilitative programs associated with "lenient" sentencing.⁷⁵ On a previous occasion, this author has noted that there is no relation between a defendant's insistence on a jury trial and the question whether he is a fit subject for probation.⁷⁶ The theory behind probation

70. See Rosenberg, *Judging Goes to College*, 52 A.B.A.J. 342 (1966); Raskin, *National College of Trial Judges*, 27 MILWAUKEE BAR ASS'N GAVEL 9 (1967).

71. See, e.g., *Papers Delivered at the Institute on Sentencing for United States Judges of the Eighth and Tenth Judicial Circuits* (1966), 42 F.R.D. 175 (1967); *Sentencing Institute of Ninth Circuit*, 39 F.R.D. 523 (1966); *Sentencing Institute for the Second Circuit*, 41 F.R.D. 467 (1966); *Papers Delivered at the Institutes on Sentencing for United States District Judges*, 37 F.R.D. 111 (1964).

72. See D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 61 (1966); ADVISORY COMM. ON THE CRIMINAL TRIAL, A.B.A. PROJECT ON MINIMUM STANDARDS OF CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 37-38 (1967) [hereinafter cited as CRIMINAL TRIAL COMM.]. REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 385-86 (1966).

73. Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

74. See, e.g., *Seminar and Institute on Disparity of Sentences for Sixth, Seventh and Eighth Judicial Circuits*, 30 F.R.D. 401, 449 (1961); REMINGTON & NEWMAN, THE HIGHLAND PARK INSTITUTE ON SENTENCE DISPARITY FEDERAL PROBATION 6 (1962).

75. See Note, *supra* note 73.

76. Pye, *Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 GEO. L.J. 675, 701 (1964).

is not leniency per se, but rather that some individual offenders should and can be rehabilitated without incarceration.⁷⁷

However, the Advisory Committee on the Criminal Trial⁷⁸ has assumed that "conviction without trial will and should continue to be a most frequent means for the disposition of criminal cases."⁷⁹ In its opinion, the existing plea bargaining system which produces a high percentage of guilty pleas "cannot operate effectively unless trial judges in fact grant charge and sentence concessions to most defendants who enter a plea of guilty or *nolo contendere*."⁸⁰ For this reason, the Committee has concluded that it is proper for a court to grant concessions when the public interest in the effective administration of criminal justice would thereby be served, but that a court should not impose upon a defendant "any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or *nolo contendere*."⁸¹

The Committee is clearly correct in concluding that mere disparity in sentencing existing between the defendant who stands trial and other defendants does not mean that the former has received excessive punishment.⁸² In a specific case, however, it may prove difficult to determine whether a defendant has received an excessive sentence or has merely been denied the leniency which he would have been accorded had he pleaded guilty.⁸³ The Committee has performed a service in ventilating an important issue too long relegated to the "low visibility" area of the criminal process, but the wisdom of its conclusion is arguable.

The question of granting leniency to defendants who plead guilty has an additional dimension. Is it professionally proper for counsel to advise a client to plead guilty when he maintains his innocence in the face of overwhelming evidence of guilt? May a court properly accept a plea of guilty under such circumstances? Most modern authorities would agree that there must be a "factual basis" for a guilty plea.⁸⁴ This, however, does not answer the questions. There may be a strong "factual basis" for believing

77. *Ibid.*

78. *Supra* note 72.

79. CRIMINAL TRIAL COMM., *supra* note 72, at 2.

80. *Id.* at 38.

81. *Id.* § 1.8.

82. *Id.* at 51.

83. Cf. *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960). See the articulate criticism of "differential leniency" in Weinberg & Babcock, Book Review, 76 YALE L.J. 568, 618-22 (1967).

84. See CRIMINAL TRIAL COMM., *supra* note 72, at § 1.6; FED. R. CRIM. P. 11; Note, *Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas*, 1966 WASH. U.L.Q. 306.

that a defendant is guilty, but he nevertheless may assert his innocence, even though his conviction may be predicted with certitude and a more severe sentence is likely if a plea of guilty is impermissible. The Committee provides an opportunity to avoid the issue in some cases with its observation that a judge "otherwise satisfied that there is a factual basis for the plea . . . is not required . . . [to] call upon the defendant to make an unequivocal confession of guilt."⁸⁵ The Committee is of the opinion, however, that "if the defendant is called upon to make a statement and he denies commission of the offense, then, notwithstanding the existence of other information tending to verify the accuracy of the plea, it would be inappropriate for the judge to enter judgment on the plea."⁸⁶ Such a position, while probably stating the traditional attitude of most courts, may present counsel with substantial problems of professional responsibility, such as the propriety of lecturing the client before ascertaining his guilt, and, if the client answers the judge's questions untruthfully, the conflict which may arise between counsel's duty of confidence to the client and his duty of candor towards the court.⁸⁷

One court of appeals has recognized the problem and, in dicta, indicated that a defendant should not be required to publicly confess his guilt.⁸⁸ It is enough that the defendant voluntarily chooses to enter the plea with an understanding of its significance, if the court is satisfied from other information before it that there is a factual basis for the plea. Mr. Weinberg and Miss Babcock have suggested that the court should not be required to inquire whether the defendant was pleading guilty "because he was guilty and for no other reason."⁸⁹ Instead, the court would simply concern itself with why the defendant wishes to enter the plea. The defendant would answer to the effect that he was doing what he thought was best in view of his lawyer's advice. The lawyer would then explain to the court why he advised this course of action and the court would determine whether the plea should be accepted.⁹⁰ A prompt resolution of the issue is obviously of great importance in a system which depends on guilty pleas for its effective operation.

Sentencing disparity continues to constitute a fundamental problem for

85. CRIMINAL TRIAL COMM., *supra* note 72, at 33. The issue might also be avoided by pleading *nolo contendere*. Cf. CRIMINAL TRIAL COMM., *id.* § 1.1 (b).

86. CRIMINAL TRIAL COMM., *supra* note 72, at 34.

87. Cf. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953); *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967). Symposium, *Profession Ethics*, 64 MICH. L. REV. 1469 (1966).

88. *McCoy v. United States*, 363 F.2d 306 (D.C. Cir. 1966).

89. See, *Resolution of the Judges of the District of Columbia* (1959), in *Everett v. United States*, 336 F.2d 979, 980 (D.C. Cir. 1964).

90. See Weinberg & Babcock, *supra* note 83, at 620-21.

the system.⁹¹ To some extent, the exchange of views among trial judges and the use of indeterminate sentences alleviates the problem. Nevertheless, most jurisdictions regularly produce cases of unusually harsh sentences meted out to certain defendants, such as the action of a Baltimore judge who sentenced a defendant to the maximum term of twenty years for a \$47 robbery, much to the shock of the Fourth Circuit Court of Appeals, which lacked power to correct the abuse.⁹² Considerable attention is now being devoted to the desirability of review of sentences by appellate courts.⁹³ The Senate has passed a bill which would permit the appellate review of sentences in the federal system.⁹⁴

Even if appellate review of sentencing does not obtain general acceptance, it is likely that appellate courts will continue to limit sentencing prerogatives of trial courts, a practice unknown in the past. One federal court of appeals has reversed a case in which the request by a recidivist for a mental examination before imposition of sentence was denied and the maximum punishment was summarily imposed.⁹⁵ Other federal courts

91. Devitt, *How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?* 42 F.R.D. 218 (1967); *Seminar and Institute on Disparity of Sentences for the Sixth, Seventh and Eighth Judicial Circuits*, 30 F.R.D. 401 (1962).

92. *Stevens v. Warden*, 382 F.2d 429 (4th Cir. 1967).

93. See Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?* 41 A.B.A.J. 13 (1955); Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79 (1966); Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379 (1964); Symposium, *Appellate Review of Sentences*, 32 F.R.D. 257 (1963). See also *Hearings on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). The Advisory Committee on Sentencing and Review, A.B.A. Project on Minimum Standards for Criminal Justice, has recommended appellate review of sentences in every case in which review of a trial leading to conviction would be available. A.B.A. SENTENCING COMM., *supra* note 54, at § 1.1.

The Advisory Committee recommended that appellate courts be authorized to reduce excessive sentences. *Id.* §§ 3.2, 3.3, 3.4. The Special Committee on Minimum Standards for the Administration of Justice, in December 1967, recommended that appellate courts be empowered to increase the sentence on appeal by the defendant. It is to be hoped that the Special Committee's recommendation will be rejected. The existence of such a power would constitute a patent deterrent to appeals, and could have the effect of increasing resort to post-conviction collateral attacks. It is extraordinary that such a proposal could be made so shortly after the English have decided to deny such power to their appellate courts after sixty years of experience with a statute that permitted an increase. REPORT OF THE INTER-DEPARTMENTAL COMM. ON THE COURT OF CRIMINAL APPEAL, MEADOR REPORT, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 62-63.

94. S. 1540, 90th Cong., 2d Sess. (1967); 1967-68 CCH CONG. INDEX 3558.

95. *Leach v. United States*, 320 F.2d 670 (D.C. Cir.), *sentence reconsidered and reinstated*, 218 F. Supp. 271 (D.D.C. 1963). Here defendant appealed the decision of the district court, and the Court of Appeals for the District of Columbia Circuit reversed the reinstatement of the sentence and remanded on the ground that refusal to order a pre-sentence mental examination was an abuse of discretion where the prisoner was an extreme recidivist. *Leach v. United States*, 334 F.2d 945 (D.C. Cir. 1964); noted, 17 STAN. L. REV. 754 (1965).

On remand, the examination was ordered, after which the original sentence was imposed. *United States v. Leach*, 231 F. Supp. 544 (D.D.C. 1964), *aff'd*, 353 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 917 (1966).

have required trial judges passing sentence to take into account the time a defendant was deprived of his liberty while awaiting trial.⁹⁶

In some jurisdictions, a defendant who receives a sentence of less than the maximum is required to play Russian roulette if he wishes to appeal. If he obtains a reversal on appeal but is convicted again on retrial, he may be sentenced to a longer term of imprisonment than he received originally, or denied credit for time served under the first conviction. Thus, in a recent North Carolina case, a defendant was sentenced to prison for a term of twenty years. Subsequently, his conviction was set aside by a federal court on the ground that he had been deprived of a constitutional right.⁹⁷ Upon retrial, he was again convicted. The trial judge purportedly gave him credit for the five years served on the original sentence, and then sentenced him to twenty years imprisonment. The defendant was in fact penalized five years for asserting his constitutional right. The Supreme Court of North Carolina saw nothing wrong with such a procedure; in its opinion, a defendant should be expected to accept the hazards as well as the benefits of an appeal.⁹⁸ Such reasoning constitutes a thinly disguised attempt to discourage appeals and collateral attacks on convictions by holding a club over the head of a defendant who has been deprived of his rights, but who has received less than a maximum sentence.⁹⁹ In *Patton v. United States*,¹⁰⁰ the United States Court of Appeals for the Fourth Circuit held that such a procedure constitutes an unconstitutional condition to the exercise of a defendant's right to a fair trial, denies a defendant the equal protection of the law, and places him twice in jeopardy for the same offense. There is a split in authority on the point,¹⁰¹ and it is regrettable that the Supreme Court declined to review the *Patton* decision.¹⁰²

96. See *Short v. United States*, 344 F.2d 550 (D.C. Cir. 1965). The Bail Reform Act of 1966 requires that credit be given for time served before trial because of inability to obtain pre-trial release. 18 U.S.C. § 3568 (Supp. II, 1966). Several courts have required that credit be given to defendants convicted before the Bail Reform Act became effective. See, e.g., *Stapf v. United States*, 367 F.2d 326 (D.C. Cir. 1966); *Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967); *United States v. Smith*, 379 F.2d 628 (7th Cir. 1967).

97. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1966). For commentary on this case see Note, 1966 DUKE L.J. 1172; Note, 80 HARV. L. REV. 891 (1967); Note, 20 VAND. L. REV. 660 (1967).

98. *State v. White*, 262 N.C. 52, 136 S.E.2d 205 (1964), cert. denied, 379 U.S. 1005 (1965); *State v. Pearce*, 268 N.C. 707, 151 S.E.2d 571 (1966).

99. See Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239 (1951); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

100. 381 F.2d 636 (4th Cir. 1967); see Note, 46 N.C.L. REV. 407 (1968).

101. Cf. *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967) (increase permissible when based on events occurring subsequent to first trial); *United States ex rel. Starner v. Russell*, 378 F.2d 808 (3d Cir. 1967) (increase permissible).

102. The Court's denial of certiorari is reported in *North Carolina v. Patton*, 390 U.S. 905 (1968).

It seems clear, however, that harsher penalties imposed under circumstances such as those of the *Patton* case will be prohibited, although perhaps on narrower grounds than those enunciated in the fourth circuit opinion.

Disposition of Defendants Who Are Not Convicted

Our system for the administration of criminal justice is becoming increasingly interested in the disposition of defendants who enter the criminal process, but who are not convicted. In most American jurisdictions, a prosecutor has wide discretionary powers, but the system has been slow to develop standards governing the exercise of this discretion.¹⁰³ Now, the Advisory Committee on the Prosecution and Defense Functions of the American Bar Association Project on Minimum Standards for Criminal Justice is attempting to articulate definitive standards.¹⁰⁴

The Judicial Conference of the District of Columbia Circuit has endorsed the learned report of a special committee which studied problems involving the disposition of offenders who are incompetent to stand trial.¹⁰⁵ Unfortunately, no legislative action to implement the recommendation of the report has been taken yet. The appropriate disposition of offenders found not guilty by reason of insanity still poses a problem. In some jurisdictions, the defendant is entitled to release, unless subject to civil commitment. In other jurisdictions, there is provision for automatic committal, at least for a period required to determine his present mental condition.¹⁰⁶

No attempt is now being made to aid acquitted defendants in readjusting.¹⁰⁷ Frequently, the defendant who has been acquitted will be plunged back into an environment with which he is unable to cope. He may need assistance in solving his problems to an extent equal to that of the convicted defendant who is on probation. Today we are beginning to appreciate that the criminal process does not exist in a vacuum. We can reasonably expect such social services to be developed during the coming years.

IV. Procedural Reform

The most significant reforms in our system for the administration of criminal justice during recent years have occurred in the field of criminal procedure.

103. See D. NEWMAN, *supra* note 72; Polstein, *How to Settle a Criminal Case*, 8 PRAC. LAW NO. 1, 35 (1962); Nedrud, *The Role of the Prosecutor in Criminal Procedure*, 32 KAN. C.L. REV. 142 (1964); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64 (1948).

104. Cf. CRIMINAL TRIAL COMM., *supra* note 72, at 60-71.

105. See JUDICIAL CONFERENCE OF DISTRICT OF COLUMBIA CIRCUIT, REPORT OF THE COMM. ON PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL (1966); cf. The particular problem posed by the defendant who suffers from amnesia. *Wilson v. United States*, No. 20887 (D.C. Cir., Jan. 18, 1968).

106. *Bolton v. Harris*, No. 21032 (D.C. Cir., Feb. 16, 1968).

107. See Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286, 299 (1966).

The Supreme Court of the United States has provided the principal leadership, but innovations have also been instituted by the Congress, some of the lower federal courts—notably the United States Court of Appeals for the District of Columbia Circuit—some of the state appellate courts—notably those of California and New York—and some of the state legislatures. There have probably been more important changes in criminal procedure during the last decade than in the total history of criminal procedure in America before 1957.

From the opinions of the Supreme Court, two distinct trends emerge. Frequently, they coalesce in specific cases.

The Trend Towards Equality

There is a clear movement toward equal protection through procedural safeguards. It has two facets. In the first place, the poor man under police investigation or charged with crime is entitled to the same rights and privileges as the wealthier citizen.¹⁰⁸ While absolute equality is not required—and indeed, probably cannot be obtained—“invidious discrimination” between the rich and the poor in the administration of criminal justice must be avoided.¹⁰⁹ This doctrine was forcefully articulated twelve years ago in *Griffin v. Illinois*.¹¹⁰ In the last decade, the *Griffin* case has spawned an impressive progeny of cases requiring states to permit an indigent, wherever a more affluent defendant could appeal by merely paying established filing fees, to appeal in forma pauperis,¹¹¹ and to provide counsel at trial¹¹² and for at least one appeal¹¹³ to an indigent charged with a felony. Although not the controlling factor, the doctrine was persuasive in the recent decisions providing procedural safeguards to indigents during police interrogations.¹¹⁴ The entire approach of the Supreme Court towards the administration of criminal justice has been marked by this quest for equal treatment.¹¹⁵ Traditional practices are now subjected to a critical reappraisal dictated by the realization that most of the people who run afoul of the criminal law are the poor, the uneducated, and members of minority groups.

108. *Griffin v. Illinois*, 351 U.S. 12 (1956).

109. *Douglas v. California*, 372 U.S. 353 (1963).

110. *Supra* note 108.

111. *Ibid.* Cf. *Lane v. Brown*, 372 U.S. 477 (1963); *Long v. District Court*, 385 U.S. 192 (1966).

112. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

113. *Douglas v. California*, *supra* note 109; *Anders v. California*, 386 U.S. 738 (1967).

114. *Miranda v. Arizona*, 384 U.S. 436 (1966); cf. *United States v. Wade*, 388 U.S. 218 (1967).

115. See Kamisar, *Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 Ky. L.J. 464 (1966); correspondence between Hon. Nicholas deB. Katzenbach and Hon. David G. Bazelon, reprinted *id.* at 486 (Appendix A).

The movement towards equality has yet another dimension. There is a clear trend towards requiring state courts to provide defendants with the same basic rights as the federal courts are obligated to provide by virtue of the Bill of Rights. The Court has gone far towards insuring that the same basic standard of procedural fairness is observed in state and federal courts by decisions which require the appointment of counsel for indigents in every felony case;¹¹⁶ prohibit the admission of evidence obtained as a result of an unlawful search and seizure;¹¹⁷ guarantee the federal privilege against self-incrimination to a witness in a state proceeding;¹¹⁸ deny prosecutors the right to comment on the defendant's failure to testify¹¹⁹ and obligate them to reveal evidence favorable to a defendant;¹²⁰ insure the defendant's rights of confrontation,¹²¹ compulsory process for witnesses,¹²² and the right to a speedy trial;¹²³ apply the same requirements in interrogation¹²⁴ and lineups¹²⁵ whether conducted by state or federal police; and impose the same tests for the resolution of the issue of admissibility of confessions at trial.¹²⁶ The Court has not sought to make state and federal criminal procedure the same,¹²⁷ but most of the basic rights enshrined in the Bill of Rights are now available to a defendant whether he is tried in a state or federal court.¹²⁸

Perhaps the most significant changes in state criminal procedure have been implemented by opinions broadening the scope of review when prisoners seek to attack collaterally in federal courts their state court convictions upon the grounds of deprivation of constitutional rights. Yet the Supreme Court has recognized that there may not be spontaneous compliance with its new requirements and that it cannot possibly review all such allegations of denial of rights. In the past, the jurisdiction of the lower federal courts upon inquiry through a writ of habeas corpus into the circumstances surrounding a conviction by a state court was severely limited. In 1963, the Supreme Court broadened the scope of review in

116. *Gideon v. Wainwright*, *supra* note 112.

117. *Mapp v. Ohio*, 367 U.S. 643 (1961).

118. *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

119. *Griffin v. California*, 380 U.S. 609 (1965).

120. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); *Miller v. Pate*, 386 U.S. 1 (1967).

121. *Pointer v. Texas*, 380 U.S. 400 (1965).

122. *Washington v. Texas*, 388 U.S. 14 (1967).

123. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

124. *Miranda v. Arizona*, *supra* note 114.

125. *United States v. Wade*, *supra* note 114; *Gilbert v. California*, 388 U.S. 263 (1967).

126. *Jackson v. Denno*, 378 U.S. 368 (1964); *Sims v. Georgia*, 385 U.S. 538 (1967).

127. *Cf. Mallory v. United States*, 354 U.S. 449 (1957).

128. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

*Fay v. Noia*¹²⁹ and *Townsend v. Sain*.¹³⁰ Federal courts may now make an independent evidentiary examination into alleged constitutional violations in a state prosecution after trial and appellate proceedings are complete, largely unfettered by state procedural rules.¹³¹ Whether the constitutional issue was raised in the state courts is immaterial to federal habeas corpus jurisdiction, although the federal judge in his discretion may decline to review the defendant's contention of constitutional error if he finds that the defendant either deliberately bypassed state procedures, or had a full hearing on the point in the state court. These opinions have been accompanied by other cases in which the Supreme Court broadened the power of federal courts to enjoin state criminal proceedings¹³² and expanded the scope of its own inquiry in direct reviews of state court convictions.¹³³

Principles of federalism have yielded to the necessity of protecting the rights of the individual. These new powers in the federal courts give the states the choice of guaranteeing the protection of the federal constitutional rights of defendants in their own courts, or having their supreme courts relegated to the status of intermediate courts in a federal hierarchy.

The Trend Towards Realistic Implementation of Rights

The second major trend in the Supreme Court is the movement towards implementation of rights to which lip service has been paid for generations. The last decade has witnessed an appreciation that rights guaranteed to the people by a constitution or statutes are less important than the rights which they are really able to exercise in practice. The right to counsel was thus of little use to the majority of Americans charged with crime who could not afford a lawyer, until the states began providing counsel for indigents.¹³⁴ The privilege against self-incrimination was of limited significance if the police could obtain confessions by inherently coercive interrogations of citizens who were either ignorant of their right to remain silent or too weak to assert it.¹³⁵ The defendant's right to remain silent at trial was illusory if a prosecutor could comment to a jury on his failure to testify, thereby encouraging the jury to infer guilt from his silence.¹³⁶

129. 372 U.S. 391 (1963).

130. 372 U.S. 293 (1963).

131. Meador, *Accommodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928 (1964); Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966).

132. *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

133. *Henry v. Mississippi*, 379 U.S. 443 (1965).

134. *Gideon v. Wainwright*, *supra* note 112. See L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* (1965) [hereinafter cited as L. SILVERSTEIN].

135. *Miranda v. Arizona*, *supra* note 114.

136. *Griffin v. California*, *supra* note 119.

Requirements of prompt presentation of arrested persons before magistrates were reduced to platitudes if police were permitted to ignore the legislative mandate and use the products of their law-breaking as evidence against a defendant in a court of justice.¹³⁷ The liberty of the individual and the sanctity of his home lost much of their meaning if police could arrest or search without probable cause and profit by their wrongdoing,¹³⁸ or if artificial rules concerning standing to object precluded judicial scrutiny of police misconduct.¹³⁹

The idea that a search warrant should be obtained from an impartial magistrate before a house is entered and searched is not novel,¹⁴⁰ nor is the notion that a search of a house without a warrant in the absence of exigent circumstances is unconstitutional. What is new is that the constitutional mandate must be observed if the police wish to use the evidence uncovered by the search.¹⁴¹ This idea may even be novel to states which already had exclusionary rules before the Supreme Court decision. Professor Michael Katz's recent study of practice in North Carolina indicates that 18 percent of the trial judges, 34 percent of the prosecutors, and 29 percent of the defense counsel surveyed were unaware that a North Carolina statute precluded the admission of evidence obtained as a result of an unlawful search and seizure before the *Mapp* decision.¹⁴²

The idea that a defendant has a privilege to remain silent and the right to counsel when subjected to police interrogation does not shock many Americans. Americans have always had the right to assistance of counsel in a criminal trial. The difference is that now indigent citizens actually have lawyers.¹⁴³ However, the notion that the police should inform a defendant of these rights and refrain from interrogating him if he chooses to exercise them causes consternation to many.¹⁴⁴

The great accomplishment of the last decade is the removal of many of the elements of hypocrisy from criminal procedure. Rights given to individuals are now being implemented and enforced. Experience may indicate that the requirements of law enforcement are inconsistent with some of these rights. If this proves to be the case, society may determine to limit

137. *Mallory v. United States*, *supra* note 127.

138. *Mapp v. Ohio*, *supra* note 117.

139. *Jones v. United States*, 362 U.S. 257 (1960).

140. *Wolf v. Colorado*, 338 U.S. 25 (1949).

141. *Mapp v. Ohio*, *supra* note 117; *Ker v. California*, 374 U.S. 23 (1963).

142. Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C.L. REV. 119 (1966).

143. See L. SILVERSTEIN, *supra* note 134, *passim*; Silverstein, *The Continuing Impact of Gideon v. Wainwright on the States*, 51 A.B.A.J. 1023 (1965).

144. Cf. *Miranda v. Arizona*, *supra* note 114.

the rights of its citizens.¹⁴⁵ Such an approach is far sounder than paying lip service to sham rights which do not exist in practice.

Expansion of Police Powers

It would be inaccurate to leave the impression that the Court has been concerned exclusively with the rights of the individual. In a number of opinions, the Court has reaffirmed or expanded the powers of law enforcement officers to investigate crime. Too often, these opinions are ignored in a catalog of the Court's accomplishments.

Today, there is no good reason why an officer with probable cause to arrest or search cannot accomplish his objective lawfully if he takes the time to apply for a warrant in the manner set forth by the Court's opinions. The Court has been most reluctant to set aside arrests or searches where officers first obtained warrants after revealing the facts underlying their conclusion of probable cause to an impartial magistrate.¹⁴⁶ It has permitted police determination of probable cause even where largely based on information provided by informants,¹⁴⁷ and generally allowed police to conceal the informant's identity from a curious defendant before trial.¹⁴⁸ It has upheld arrests without warrants or searches where probable cause existed to believe that the suspect had committed an offense, even though the police had adequate time to obtain a warrant and chose not to avail themselves of the opportunity.¹⁴⁹ The Court has permitted searches of vehicles without a warrant when there was probable cause to believe that they were carrying contraband,¹⁵⁰ entries into houses without advance warning of the officer's identity or purpose where there were "exigent circumstances,"¹⁵¹ and a search of a dwelling without a warrant in "hot pursuit" of the defendant or weapons.¹⁵² Recently, the Court has placed its imprimatur upon searches, the object of which is to locate nontestimonial evidentiary material, despite a long federal history which limited lawful searches to contraband, and the fruits or instrumentalities of crime.¹⁵³

145. Symposium, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 *FORDHAM L. REV.* 169 (1966); Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality*, 56 *J. CRIM. L.C. & P.S.* 32, 37 n.8 (1965).

146. *Cf. United States v. Ventresca*, 380 U.S. 102 (1965); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Beck v. Ohio*, 379 U.S. 89 (1964).

147. *See Rugendorf v. United States*, 376 U.S. 528 (1964); *Jones v. United States*, *supra* note 139; *Draper v. United States*, 358 U.S. 307 (1959).

148. *McCray v. Illinois*, 386 U.S. 300 (1967).

149. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Ker v. California*, *supra* note 141.

150. *Carroll v. United States*, 267 U.S. 132 (1925); *Brinegar v. United States*, 338 U.S. 160 (1949).

151. *Ker v. California*, *supra* note 141; *cf. Miller v. United States*, 357 U.S. 301 (1958).

152. *Warden v. Hayden*, 387 U.S. 294 (1967).

153. *Ibid.*

It has also rejected contentions that police officers should not be permitted to use informers and undercover agents.¹⁵⁴ Although the Court set aside a conviction involving the identification of a defendant at a lineup conducted in the absence of defense counsel, it made it clear that legislation eliminating the risks of abuse and unintentional suggestions at lineup proceedings may also remove the basis for requiring the presence of counsel.¹⁵⁵ It declared a New York electronic surveillance statute unconstitutional, but suggested that a more restricted statute might be constitutional.¹⁵⁶ The Court has allowed spontaneous confessions and statements by a defendant resulting from police interrogation if the government is able to establish that the defendant voluntarily waived his right to remain silent after being warned of his privilege against self-incrimination and his right to counsel.¹⁵⁷ It has specifically refrained from imposing upon the states the strict federal rules excluding evidence obtained during a period of unnecessary delay between arrest and presentment before a committing magistrate.¹⁵⁸

In balance, it must be conceded that police powers have been reduced as a result of the Court decisions during the last decade. It is certainly unjustified, however, to conclude that the police have been handcuffed.

The Court has permitted the police to engage in tactics needed in solving most crimes. There may be some "solitary killers where the only witnesses to their crimes are dead"¹⁵⁹ who may escape punishment by asserting their constitutional rights. These are the cases which cause the most public furor, because, as the National Crime Commission has pointed out, "the public fears most the crimes that occur least often, crimes of violence."¹⁶⁰ However, many of these offenses are the easiest to solve because most murders, rapes, and aggravated assaults are apparently committed by persons known to the victim—by relatives, friends, or acquaintances.¹⁶¹ The District of Columbia Crime Commission study revealed that almost two-thirds of rape victims surveyed were attacked by persons with whom they were at least casually acquainted.¹⁶² Eighty-one percent of assault victims

154. *Hoffa v. United States*, 387 U.S. 231 (1967); *Lewis v. United States*, 385 U.S. 206 (1966); *Osborn v. United States*, 385 U.S. 323 (1966).

155. *United States v. Wade*, *supra* note 114.

156. *Berger v. New York*, 388 U.S. 41 (1967). See also *Katz v. United States*, 389 U.S. 347 (1967); *Dash, Katz—Variations on a Theme by Berger*, 17 CATHOLIC U.L. REV. 296 (1968).

157. *Miranda v. Arizona*, *supra* note 114.

158. *Mallory v. United States*, *supra* note 127; *Miranda v. Arizona*, *supra* note 114.

159. Broderick, *The Supreme Court and the Police: A Police Viewpoint*, 57 J. CRIM. L.C. & P.S. 271 (1966).

160. REPORT BY THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 51 (1967).

161. *Id.* at 39-40.

162. *Id.* at 40.

were acquainted with their assailant.¹⁶³ In Philadelphia only 12.2 percent of murders were committed by strangers.¹⁶⁴ Other studies have revealed that a very high percentage of crimes of violence are committed against victims of the same race as the offender.¹⁶⁵ The interracial rape or murder is the exception rather than the rule.

Most cases can be solved by competent law enforcement agencies within the guidelines established by the Court's decisions. Furthermore, it does not follow that broadened police powers will significantly affect the number of cases prosecuted or the number of defendants convicted. In the routine cases constituting the bulk of the criminal docket, many other more significant factors, such as the availability of prosecutors and judges and standards of prosecutorial discretion, may intervene between the close of a police investigation and final disposition.¹⁶⁶ Too often, people jump to the conclusion that broadened police powers will necessarily result in substantially more convictions, or that more convictions will substantially reduce the crime rate.

Congressional Reforms

The Supreme Court has not been responsible for all criminal procedure reforms; the Congress deserves credit for several important innovations. The Criminal Justice Act of 1964¹⁶⁷ provided for the first time compensation for attorneys appointed to represent indigents in federal criminal cases, along with auxiliary services such as reimbursement for out-of-pocket costs incurred during investigations, funds to permit the hiring of investigators in special cases, and fees for expert witnesses.¹⁶⁸

Bail Reform

Perhaps the outstanding contribution of the Congress has been in the reform of the bail system. The right to bail is insignificant to a defendant unable to pay a bond premium. For some time, it has been known that even small bonds are beyond the financial capacity of many defendants.¹⁶⁹ Only more recently, has it been learned that many defendants charged

163. *Ibid.*

164. *Id.* at 39.

165. *Id.* at 40.

166. Pye, *The Supreme Court and the Police: Fact and Fiction*, 57 J. CRIM. L.C. & P.S. 404, 413 (1966).

167. 18 U.S.C. § 3006 (a) (1964). See Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703 (1965).

168. *Ibid.*

169. L. SILVERSTEIN, *supra* note 134, at 7-8; D. FREED & P. WALD, *BAIL IN THE UNITED STATES* 9-22 (1964); Comment, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); Comment, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958).

with crime may be released on their personal recognizance, without any appreciable danger that they will abscond before trial.¹⁷⁰

The use of personal recognizance or other nonfinancial conditions can assure pre-trial liberty to a substantial number of defendants who in the past have been imprisoned before trial solely because of their inability to pay a bond premium.¹⁷¹ It also reduces the cost to the municipality which otherwise would have to pay the direct costs of detention, and frequently the indirect costs of public welfare assistance to the defendant's family.¹⁷² Furthermore, it restores rationality to the system.

In 1966, the Congress passed the Bail Reform Act.¹⁷³ The Act provides that any person charged with a noncapital offense in a federal court shall be released on his personal recognizance or upon the execution of an unsecured appearance bond, unless the committing magistrate determines that release under such conditions will not reasonably assure the appearance of a defendant at trial.¹⁷⁴ If the judge finds that something more is required to assure the defendant's presence at trial, he is authorized to release the defendant in the custody of a designated person or organization agreeing to supervise him, place restrictions on his travel, associations or place of abode, or require him to deposit not more than ten percent of the amount of an appearance bond as security with the provision that the amount will be returned to the defendant if he appears on the appointed day.¹⁷⁵ The judge is further authorized to require the execution of a bail bond with sureties only if one of these conditions or a combination of them is deemed to provide inadequate assurance of the defendant's presence at trial.¹⁷⁶ If the defendant cannot obtain his release after twenty-four hours, he is entitled to have the conditions reviewed by the judge who imposed them.¹⁷⁷ The judge is required to state in writing the reasons for the condition imposed if he does not amend the conditions to enable the defendant to obtain his release.¹⁷⁸

170. Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67 (1963); McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 GEO. L.J. 675 (1965); R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL: FINAL REPORT OF THE D.C. BAIL PROJECT (1966). Cf. R. GOLDFARB, RANSOM (1965); REPORT OF THE ATTORNEY GENERAL'S COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

171. R. MOLLEUR, *supra* note 170, at 31.

172. *Id.* at 87-96.

173. 18 U.S.C. § 3146 (Supp. II, 1966). See Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966); Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429 (1967).

174. 18 U.S.C. § 3146 (a) (Supp. II, 1966).

175. *Ibid.*

176. *Ibid.*

177. 18 U.S.C. § 3146 (d) (Supp. II, 1966).

178. *Ibid.*

The statute obviously proceeds upon the assumption that the benefit of the doubt should be given to pre-trial release. Its administration has disclosed an important problem which in the past had been somewhat obscured. American law has never permitted the denial of bail because the accused is thought to be dangerous.¹⁷⁹ In fact, however, trial judges have been able to "preventively detain" a supposed dangerous offender simply by fixing a bond beyond his capacity to meet. Now, for the first time the system is required to determine forthrightly whether society should be able to deny a defendant his liberty before trial, not because he may flee the jurisdiction, but because he may commit "another offense." Greater knowledge of the effect of prior practices has resulted in considerable concern, and the operation of the Act is now being studied.¹⁸⁰ One senator has gone so far as to introduce legislation to permit preventive detention of dangerous defendants.¹⁸¹

The Bail Reform Act has also demonstrated that judges need assistance in determining the conditions, if any, to be imposed upon a defendant seeking pre-trial liberty. The problem is akin to that faced by a judge in sentencing. Congress has established a bail agency in the District of Columbia¹⁸² to accomplish this function. In other areas, private organizations modeled after the highly successful Vera Foundation Manhattan Bail Project in New York City are providing similar assistance. Unfortunately, similar services are not available to most judges.

The federal reform has provided the impetus to projects across the country. Legislation designed to reform the bail system has been passed or introduced in a number of states, and experimental projects are operating in many municipalities.¹⁸³

Improved Training and Personnel

The crying need of the criminal justice system is for more and better personnel and techniques. This costs money. While the administration of criminal justice is a matter of national concern, the responsibility for law enforcement is primarily a matter of local or state concern. Frequently,

179. Cf. 50 U.S.C. § 813 (1964); Act of Sept. 23, 1950, ch. 1024, Tit. II, § 103, 64 Stat. 1021.

180. A committee has been appointed by the Judicial Conference of the District of Columbia Circuit to study the matter. In addition studies have been conducted by the Office of Criminal Justice of the Department of Justice. See also *United States v. Penn*, No. 1434-67 (D.C. Ct. Gen. Sess., Jan. 30, 1968).

181. S. 484, 90th Cong., 1st Sess. (1967).

182. 80 Stat. 327 (1966).

183. See Silverstein, *Bail in the State Courts—A Field Study and Report*, 50 MINN. L. REV. 621 (1966); Note, *Bail Reform in the State and Federal Systems*, 20 VAND. L. REV. 948 (1967).

however, state and local governments do not have or will not allocate funds necessary to train their law enforcement officers or to modernize their law enforcement techniques.

To encourage state and local governments to meet these needs, Congress enacted the Law Enforcement Assistance Act of 1965.¹⁸⁴ This measure authorizes the Attorney General to grant funds and contract for the establishment, improvement, or enlargement of programs and facilities for the training of state and local law enforcement, correctional and crime prevention personnel, and to contract with private or public nonprofit organizations for the support of projects designed to improve techniques, practices, and capabilities of state and local agencies engaged in law enforcement, criminal law administration, correction of offenders, or prevention and control of crime. Over 250 grants have been made. The Act has proved to be an excellent example of "creative federalism," although the funds available have been limited.

In 1967, a new bill was introduced. Originally called the "Law Enforcement and Criminal Justice Assistance Act," it has been renamed the "Crime Control and Safe Streets Act" during its travels through the Congress. The bill was designed to broaden the extent of federal support to state and local programs designed to improve the administration of justice.

In the House, the bill was amended to authorize grants for the establishment and operation of state planning agencies to be responsible for developing comprehensive statewide plans.¹⁸⁵ Federal funds would be distributed in block grants to the states rather than on the basis of need and willingness and capacity to innovate. In effect, the state organization would be an intermediary which would screen applications and distribute funds to local communities.

There can be little objection in theory to state planning. In practice, however, it assumes a law enforcement structure within each state which simply does not exist in many jurisdictions. All the states, except Hawaii, have some form of state law enforcement body.¹⁸⁶ Some have general policing authority, but many are restricted to the functions of enforcing traffic laws and protecting life and property on the highways. They may provide logistic services such as criminal identification systems, police training programs, or state communications systems, but few have the authority or expertise to assume the coordinating role that the amended bill would

184. Pub. L. No. 89-197, Sept. 22, 1965, 79 Stat. 828, as amended by Pub. L. No. 89-798, Nov. 8, 1966, 80 Stat. 1506.

185. H.R. 5037, 90th Cong., 1st Sess. (1967); see H.R. 488, 90th Cong., 1st Sess. (1967).

186. REPORT BY THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 119-23 (1967).

impose on them. There is little doubt that the limited federal money available can best be spent by direct grants to innovative communities and institutions, rather than by paying the costs of establishing and operating state planning agencies. The House version of the bill could in fact become a patronage distribution act as local communities apply pressure for a slice of the federal pie. The bill passed the House on August 8, 1967.

The fate of the bill in the House was pleasant compared to its reception in the Senate Judiciary Committee. The Judiciary Committee reported out a bill, Title II of which contains a number of unfortunate amendments.¹⁸⁷ One would deny lower federal court jurisdiction to entertain collateral attacks on state court criminal judgments, even where defendants' constitutional rights have been abridged, thereby overruling *Townsend v. Sain* and *Fay v. Noia*. Another would deprive both the lower federal courts and the Supreme Court of power to review the voluntariness of a confession admitted in a state criminal trial where the highest court of the state has found the confession voluntary, regardless of whether the state court flagrantly defied the Supreme Court's prior determinations requiring application of appropriate standards under the fourteenth, sixth and fifth amendments. Another provision would permit the introduction of a confession in a federal trial if the court determined that the confession was voluntary, even if authorities obtained the confession during custodial interrogation without informing defendant of his privilege against self-incrimination or of his right to assistance of counsel, required by the Court's interpretation of the fifth amendment in *Miranda v. Arizona*.

The bill would also overturn the *McNabb-Mallory*¹⁸⁸ doctrine, which for twenty years has excluded in federal courts admission of confessions obtained during a period of unnecessary delay between arrest and presentment before a magistrate. Another amendment, apparently designed to overrule the Supreme Court's decisions in the *Wade* and *Gilbert*¹⁸⁹ cases, would not only permit the introduction of "eye witness" testimony where a defendant has been denied assistance of counsel at a lineup in violation of the sixth amendment, but would also permit admission of testimony itself constituting a denial of due process of law, as in the case of testimony resulting from an unfairly staged lineup.

At this late date in constitutional history it should be clear that the Supreme Court is the final arbiter of the meaning of the Constitution. The Court has interpreted the fifth amendment in *Miranda* and the sixth amendment in *Wade*. It is neither the function of the Congress nor within its power to

187. S. 917, 90th Cong., 1st Sess. (1967).

188. *McNabb v. United States*, 318 U.S. 332, *rehearing denied*, 319 U.S. 784 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

189. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

overrule these decisions. Equally clear, Congress cannot require a federal court to permit a conviction resting upon evidence obtained in violation of the Constitution.

It is doubtful that Congress has the authority to deny the Supreme Court the right to review a state court ruling admitting a confession obtained in violation of the fifth or fourteenth amendments, after a state supreme court has opined that the confession is voluntary. Although the power to limit appellate jurisdiction of the Supreme Court finds support in *Ex Parte McCardle*,¹⁹⁰ it is doubtful whether that case would be decided the same way today. Even if it continues to have validity, it may be distinguished. The bill in question poses grave problems of equal protection which the Court in *McCardle* did not face since it would deprive a single class of defendants, those whose confessions have been found voluntary by the highest state courts, of the right to petition the Supreme Court to review lower court rulings affecting their constitutional rights. It is extremely questionable whether this class of defendants is sufficiently distinctive to merit subjecting its members to this type of overt discrimination. Such an attempt to divest the Court of appellate jurisdiction in an area where Congress disagrees with its decisions poses a grave threat to the balance of powers.

The proposed denial of jurisdiction to lower federal courts in cases where state criminal judgments are attacked on constitutional grounds is defended upon the ground of congressional power to limit lower federal court jurisdiction. Its practical effect would be to suspend for state prisoners the federal writ of habeas corpus, the "Great Writ" which has protected the liberty of English-speaking persons for almost three hundred years. In addition, substantial problems of equal protection are implicit where the meaning of the Constitution depends on local option, unless Supreme Court review can be obtained. Even if such a drastic step is constitutional, it is clearly unwise. Large numbers of cases are now brought to federal courts by state prisoners because of the refusal or failure of some state courts to follow Supreme Court decisions, and the failure of most states to enact modern post-conviction remedies. The Supreme Court is not able to review all cases in which there are substantial allegations of deprivation of constitutional rights. To permit the continued confinement of state prisoners, whose convictions rest upon evidence obtained in violation of the Constitution, or whose sentences violate constitutional mandates, would make the Bill of Rights meaningless to a substantial number of citizens accused of crime, and reduce the supremacy clause to a meaningless rubric in the field of criminal procedure. It would also remove one of the principal incentives to the reform of state criminal procedure.

190. 74 U.S. (7 Wall.) 506 (1869).

Overturning the *McNabb-Mallory* rule is also unwise. It has proved to be an effective device for discouraging arrests without probable cause and implementing the privilege against self-incrimination, the right to counsel, and the right to bail. Furthermore, there is no evidence that it has constituted any impediment to federal law enforcement. Congressional legislation last year overturned the *Mallory* rule in the District of Columbia, but incorporated the constitutionally required *Miranda* safeguards conspicuously absent from the present bill. The present effort to overturn *Mallory* can only be described as an attempt designed to reverse the trend of the Court's recent criminal procedural reforms which have strengthened the rights of the individual without comparable benefits to law enforcement. The manner in which the bill seeks to achieve these objectives again raises doubt concerning its constitutionality. Although not permitting delay in order to interrogate, the bill does require the court to sustain admission of evidence obtained during a period of unlawful delay. Such an approach is inconsistent with the imperative of judicial independence and the integrity of the processes of justice implicit in Article III of the Constitution. Unfortunately, the Senate approved many of the amendments on May 21, 1968.

The President has recently renewed his request for legislation and urged that \$100 million be appropriated. It is hoped that Congress will respond without any politically inspired pork barrel amendments or attempts to limit federal court power to require state observance of the Constitution. Hopefully, Congress will grant broad authority to the Attorney General to provide grants for projects dealing with the correctional system and court administration, as well as law enforcement activities.

Two other federal measures deserve attention. Congress has established the National Commission on Reform of Federal Criminal Laws.¹⁹¹ Professor Louis B. Schwartz is directing an ambitious project that should not only remove much of the present confusion and inconsistency in federal law, but provide a model for state code revisions as well. Congress is also considering a major reform of the United States Commission System. A bill which would replace United States Commissioners with a system of federal magistrates has been passed by the Senate and is now pending in the House.¹⁹²

V. The Future

The changes of the last decade have unalterably changed the course of American criminal procedure. Reasonable men may differ as to whether

191. Pub. L. No. 89-801, Nov. 8, 1966, 80 Stat. 1516.

192. S. 945, 90th Cong., 1st Sess. (1967); 1 CRIM. L. RPTR. 2184 (1967).

all of the changes were reforms, but no student of the process can fail to see the general directions in which our criminal procedure will continue to evolve.

The pace of change may be less swift in the future. Many of the big issues involving interrogation and search and seizure have been decided. During this term, the Court will deal with the important issue of the power of a police officer to stop, frisk, and interrogate a suspect when he has no probable cause to believe that any offense has been committed by the person detained.¹⁹³ In the future, it must provide additional guidance concerning what constitutes a "custodial interrogation," a "waiver," or "the fruit of the poisonous tree" within the context of the interrogation procedures laid down in *Miranda*.¹⁹⁴ It has yet to decide whether the right to bail is a federal constitutional right. The constitutional requirements for permissible electronic surveillance need to be elaborated.¹⁹⁵ Undoubtedly, other important issues will also require resolution.

To a large extent, however, the coming years will be an era of implementation and enforcement of the doctrines enunciated during the last decade, rather than a period of new fundamental change. The Supreme Court has provided the outlines of the criminal procedure which it thinks should be followed in a civilized society. It is up to the states to translate these principles into reality and to accommodate their procedures to the Supreme Court model. They have been presented a great challenge. It remains to be seen whether they will be equal to it.

Some may choose to sit back and criticize Supreme Court justices as "judicial activists," or complain that too much attention has been given to the rights of criminals and not enough to the rights of the public, or complain about "sociological jurisprudence." Others may exhaust their energies in futile attempts to deprive the Supreme Court of its jurisdiction to review certain types of criminal cases or to amend the Constitution to provide that every person is presumed to know his rights, and to permit prosecutors to comment on the defendant's exercise of his rights. Others may simply do nothing, adopting the view that they will take no action until the Supreme Court requires it, regardless of the clear thrusts of the opinions. Some would like to take constructive action, but the shortage of human and material resources have produced a frustration which expresses itself in

193. *Sibron v. New York*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966), *prob. juris. noted*, 386 U.S. 954 (1967); *Peters v. New York*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966), *prob. juris. noted*, 386 U.S. 980 (1967); *Terry v. Ohio*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966), *cert. granted*, 387 U.S. 929 (1967); *Wainwright v. New Orleans*, 248 La. 1097, 184 So. 2d 23 (1966), *cert. granted*, 385 U.S. 1001 (1967).

194. See Pye, Symposium, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169, 199 (1966).

195. See *Katz v. United States*, *supra* note 156.

inaction. Such attitudes border on nihilism. The immediate result of a failure to implement Supreme Court decisions is the prompt reversal of state judgments.¹⁹⁶

Even more significant than reversal of individual cases may be the erosion of the principles of federalism which will result from a consistent failure by state courts to enforce constitutional mandates. Reexamination of the state supreme courts' judgments by the lowest federal courts will become the rule instead of the exception. Fortunately, these factors seem to be understood; state legislators and judges, with some notable exceptions, are undertaking the task of reexamining state procedures in the light of the recent decisions. The task is formidable.

All states now provide counsel for the indigent in felony trials. However, a substantial number do not provide counsel in preliminary examinations, misdemeanor trials, or post-conviction proceedings. Although the authorities are now split,¹⁹⁷ there is little doubt that the Supreme Court will require counsel in all criminal proceedings punishable by any substantial loss of liberty when an appropriate case reaches it.¹⁹⁸ It is difficult to imagine the Court endorsing a doctrine which determines the existence of a right to counsel on the basis of whether the state chooses to label a particular offense as a misdemeanor or a felony.¹⁹⁹ States which do not provide counsel in misdemeanor cases are operating on borrowed time.

To encourage police officers to seek warrants, the Supreme Court has liberally approached arrests and searches authorized by warrants.²⁰⁰ This favoritism shown to warrants rests upon two assumptions. In the first place, it is assumed that the warrant application or the affidavit in support thereof will reveal facts underlying the existence of probable cause and the reliability of the source of information. In many states, warrants have customarily been issued upon an officer's naked conclusion that there was probable cause to arrest or search. In such states, the officer is not required to reveal to the magistrate any of the facts necessary for an in-

196. See, e.g., *Beecher v. Alabama*, 389 U.S. 35 (1967); *Sims v. Georgia*, *supra* note 126; *Brooks v. Florida*, 389 U.S. 413 (1967).

197. The cases are collected in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 37-45 (Tent. Draft 1967) [hereinafter cited as DEFENSE SERVICES].

198. DEFENSE SERVICES recommends that counsel be provided in all criminal proceedings for offenses punishable by loss of liberty, "except those types of offenses for which such punishment is not likely to be imposed . . . in all proceedings arising from the initiation of a criminal action against the accused, including extradition, mental competency, post-conviction and other proceedings which are adversary in nature." *Id.* §§ 4.1, 4.2. It recommends that counsel should be provided to the accused "as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest." *Id.* § 5.1.

199. *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965).

200. See authorities collected *supra* note 146.

dependent evaluation of whether probable cause exists. Such a warrant does not meet fourth amendment requirements. States permitting such procedures should follow the lead of Georgia²⁰¹ and amend their statutes to require the officer to state the basis for his conclusion.

The Supreme Court has also clearly indicated that the officer issuing the warrant should have independent judicial discretion.²⁰² In some states warrants may be issued by mayors, court clerks, or justices of the peace²⁰³ who are not necessarily lawyers, and who may even be police officers.²⁰⁴ Assuming, but not conceding, the requisite degree of judicial objectivity, it is doubtful whether many of these persons have the necessary expertise to evaluate warrant applications under the light of the Supreme Court cases. It is also doubtful that they always understand the role they are expected to play. One wonders how many warrants are issued by persons such as the assistant clerk who candidly testified that she routinely issued warrants upon witnessing the signatures of officers.²⁰⁵ The states must carefully consider limiting the classes of persons who may issue warrants to individuals who combine both expertise and judicial independence.

Two years ago, the Supreme Court in *Miranda*²⁰⁶ laid down detailed rules for custodial interrogation of suspects. Basically, it requires police to inform a suspect that he has a right to remain silent, that anything that he says can and will be used against him, that he has a right to the advice and presence of a lawyer, and that a lawyer will be provided for him if he is unable to afford one.²⁰⁷ Furthermore, the Court said that the suspect must be permitted to exercise his rights after he is informed of their existence.²⁰⁸ Interrogation must normally cease if a witness indicates that he wishes to remain silent or to consult a lawyer.²⁰⁹ A suspect may waive his rights and give a statement, but the government must assume a "heavy burden" to demonstrate that he "knowingly and intelligently" waived his rights.²¹⁰

201. GA. CODE ANN. § 27-103.1 (Supp. 1967).

202. See authorities collected *supra* note 146.

203. E.g., N.C. GEN. STAT. §§ 15-25.1, 15-25.2, 18-13 (1965).

204. State v. McHone, 243 N.C. 231, 90 S.E.2d 536 (1955). This case involved an arrest warrant; hopefully, it would not be followed today.

205. State v. Upchurch, 267 N.C. 417, 148 S.E.2d 259 (1966).

The clerk testified that: "[a]ll I can say is they come in and ask if I will witness their signature, and I witness it." The Court properly concluded that "it seems evident from her testimony that she does not have the slightest comprehension as to what her legal duties and responsibilities are in connection with the issuance of a search warrant.

Id. at 419, 148 S.E.2d at 260-61. See Katz, *supra* note 142, at 144.

206. 384 U.S. 436 (1966).

207. *Id.* at 467-73.

208. *Id.* at 474.

209. *Ibid.*

210. *Id.* at 475-76.

The extent to which law enforcement agencies are complying with *Miranda* is unclear. Quite likely, some policemen have only a vague idea of the warnings required by *Miranda*. Some law enforcement officers who do understand the holding undoubtedly may be ignoring the decision. Others may be following the "Dragnet" approach, by reading the warnings as a rote exercise before interrogating as usual. In some jurisdictions, there seems to be a genuine effort to comply with the Court's mandate. Police practices and the effects of the warnings are now being studied in several cities.²¹¹

Most communities have not yet developed systems to provide counsel for indigents at the station house. An indigent who seeks to assert his right thus cannot consult counsel until he is presented to the court. Undoubtedly, some defendants who initially decline to confess will decide after a few hours in a cell to talk with the police, particularly if they cannot determine how soon they will have a chance to consult counsel. Some of the resulting confessions may be genuine waivers; others will be the product of coercion induced by incommunicado confinement combined with the defendant's lack of knowledge concerning the time that it will terminate. Usually it will not be possible to know in which category a particular confession should be placed. A finding of waiver under such circumstances will reduce the *Miranda* doctrine to meaningless rubrics.²¹²

Last year the Supreme Court held that a police lineup is normally a "critical stage" of the proceeding at which the defendant, in the absence of waiver,²¹³ must be represented by counsel. However, it also indicated that counsel might not be required if police departments took steps which would "eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial"²¹⁴ There is good reason to believe that lineups in the absence of counsel are being routinely conducted in many communities throughout the country. There is a substantial risk of contaminating a subsequent criminal prosecution each time a defendant is identified at a lineup of the kind traditionally conducted by the police. Again, it is necessary for the states to

211. See Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967). Detailed studies are also being conducted by the Vera Institute in New York, the Georgetown University Institute of Criminal Law and Procedure in Washington, and elsewhere.

212. Cf. *State v. Bishop*, 272 N.C. 283, 158 S.E.2d 511 (1968).

213. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967). See Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65 (1967); Comment, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967).

214. *United States v. Wade*, *supra* note 213.

take prompt action not only to protect the constitutional rights of defendants, but to provide their police with the working tools which they require.

Speedy improvement is needed in many state systems of post-conviction remedies, not only to protect the rights of the citizenry but to decrease federal intervention in the handling of state prisoners' complaints of injustice.²¹⁵ State trial judges must appreciate the importance of providing a full hearing on any claimed violation of a federal constitutional right, not only to be fair to the defendant, but also to protect the state proceeding from subsequent attack in the federal courts.

Equally important is the education of state judicial administrative personnel and the improvement of their techniques. The needs of state law enforcement, judicial, and correctional agencies must be ascertained and proposals prepared with the object of seeking federal support.

These are only some examples of the areas in which state action is urgently required. A systematic study should be conducted in all states to determine what changes are necessary. Such studies can profit from outstanding research now being conducted by the Ford-Foundation-supported institutes at Georgetown University, the University of Chicago, the University of California, and Stanford University; the studies of the Vera Foundation in New York; the American Bar Association Project on Minimum Standards for Criminal Justice; the work of the American Law Institute on its Model Code for Pre-Arrestment Procedure; and the monumental reports of the President's Crime Commissions.

VI. Conclusion

No reason exists for complacency in the judicial administrative system but there is reason to be proud of the progress achieved so far. Some say that history judges the quality of a civilization by the way in which it treats citizens accused of crime. By this standard, America has a fair claim to the title of the world's most enlightened nation. Others evaluate a system's effectiveness by the extent to which it has eradicated crime. By this test, the United States has a long way to go. Perhaps the best standard would combine both factors and ask whether the job being done is commensurate with the resources at society's disposal. The current period of transition makes such a judgment difficult. In another ten years we may be in a better position to give an answer.

215. See A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO POST-CONVICTION REMEDIES (Tent. Draft, 1967).

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